UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 7
	:	
SHARON M. SMITH,	:	Bankruptcy No. 07-15516DWS
aka Sharon Nicholson,	:	
	:	
Debtor.	:	
	:	
UNITED STATES OF AMERICA,	:	Adversary No. 07-0424
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SHARON M. SMITH,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

BY: DIANE WEISS SIGMUND, United States Bankruptcy Judge

Before the Court is the Motion of Debtor/Defendant Sharon M. Smith (the "Debtor") to Dismiss Complaint to Determine Dischargeability (the "Motion") filed by the United States of America (the "Government").[1] The Debtor contends that the Government's failure

[1] The Complaint relies on 11 U.S.C.§523(a)(2)(A) alleging a debt to the Social Security Administration was incurred by false pretenses, a false representation or actual fraud, other than a statement representing the debtor's financial condition. Specifically the Government avers that (continued...)

to serve a summons in connection with its Complaint within the 120 days required by Federal Rule of Civil Procedure 4(m), as incorporated in Federal Rule of Bankruptcy Procedure 7004 ("Rule 4(m)"), dictates dismissal of the Complaint. A hearing was held on the Motion at which counsel presented argument in favor and opposed to the Motion. While no evidence was presented, I will take judicial notice of the docket entries in the bankruptcy case 07-15516 ("Main Case") and adversary case 07-0424 (Adversary Case") to determine the procedural history of this matter.[2] Fed.R.Evid. 201, incorporated in these proceedings by Fed.R.Bankr.P. 9017. See Maritime Elec. Co., Inc. v. United Jersey Bank, 959 F.2d 1194, 1200 n.3 (3d Cir. 1991).

BACKGROUND

On December 17, 2007 the Complaint initiating this adversary case was electronically filed but erroneously docketed by Joel Sweet, Esquire in the Main Case as a Counterclaim. Doc. 21 (Main Case). Accordingly, no summons was issued by the Clerk. On May 29, 2008, the filing was corrected. The Adversary Case was opened, and a summons was issued. Doc. Nos. 1, 2. On July 14, 2008, consistent with my case management protocol when no answer has been filed, an Order was entered directing plaintiff to file the appropriate motion under Bankruptcy Rule 7055 within 15 days of the date of the Order or the proceeding

(...continued)
Debtor received disability benefits based on false and fraudulent representations concerning her income.

[2] The docket entries referenced are to the Adversary Case unless otherwise noted.

may be dismissed for lack of prosecution (the "Lack of Prosecution Order"). Doc. No.3. Apparently that Order prompted the recognition that Debtor had not been served, as the docket reflects mail service of the summons on July 21, 2008. Doc. No. 4. On September 3, 2008 when an answer still did not appear on the docket, a second Lack of Prosecution Order was entered. Doc. No.5. In response a praecipe to reissue summons was filed on September 8, 2008 and an alias summons issued for service on Debtor. Doc. No. 7, 8. On September 9, 2008, the new Summons was served. Doc. No. 9.[3]

On October 7, 2008 the Motion was filed. It is clear that the factual predicate for the relief being sought has been met. Service of the Summons occurred more than 120 days after the filing of the Complaint. While not conceding that point,[4] the Government argues that there is good cause for any untimely action and in any event, there is no prejudice to the Debtor. Debtor acknowledges the absence of prejudice[5] but contends that the

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[3] Defendant concedes that proper service was made on July 21, 2008. The subsequent praecipe to reissue summons and its service was not relied upon, perhaps because July 21, 2008 was already outside the 120 days of Rule 4(m).

[4] The Government argued that the time should run from the corrected docketing of the Complaint on May 29, 2008 but abandoned that argument when I pointed out that the bar date for filing dischargeability actions in this case was December 17, 2007, and under that theory, the Complaint would be time barred. Fed.R.Bankr.P. 4007(c). See Doc. No. 9 (Main Case). I also reject the Government's argument that the mailing of the Complaint to Debtor's counsel who had not accepted service within that period complied with the service requirement of Rule 4(m). The notion that any failure on its part is a "technical defect" and not a violation of the Rule has no basis in the law. The Government, like any other litigant, must comply with the Federal Rules of Civil Procedure.

[5] I assume that Debtor was aware of the Complaint during the Rule 4(m) service period based on the mailing to her counsel. Dunkley v. Rutgers, 2007 WL 2033827, at *5 (D. N.J. July 11,

(continued...)

Government should be held to a higher standard of competence and diligence and Rule 4(m) should be strictly applied.

DISCUSSION

Rule 4(m), which serves as the basis for the Motion, provides:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

The Third Circuit Court of Appeals has prescribed the inquiry governing the application of Rule 4(m). First, I must consider whether there was good cause for the failure to effect timely service. A positive conclusion ends the matter as Rule 4(m) mandates that the service time be extended in such case for an appropriate period. However, if good cause is absent, I must then determine whether to dismiss or direct that service be made within as specified time. Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995).

Good cause. In MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086 (3d Cir. 1995), the Circuit Court explained what would and would not be good cause to excuse late service. It recognized three factors to consider in making a good cause

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(...continued)
2007) (no prejudice from late service where defendants were opposed of the pendency of the action and afforded the opportunity to present their objections). I do not agree with Debtor's counsel that the fact that she is a poor person who would have to defend the case and might lose her discharge is the type of prejudice contemplated to arise from late service.

determination: (1) reasonableness of plaintiff's efforts to serve, (2) prejudice to the defendant by lack of timely service and (3) whether plaintiff moved for an enlargement. Id. at 1097.[6] It noted that the absence of prejudice alone can never constitute good cause and observed that while lack of prejudice "may tip the 'good cause' scale, the primary focus is on the plaintiff's reasons for not complying with the time limits in the first place." Id.

In support of its good cause argument, the Government's sole explanation for its untimely service is that the departure of the Department's sole bankruptcy lawyer left the Government without an attorney familiar with bankruptcy. Aside from the fact that this contention was unsupported by any evidence, it is apparent that the breached rule is only a bankruptcy rule by reason of its incorporation into the Federal Rules of Bankruptcy Procedure. Rather Rule 4(m) is a rule applicable to all civil trials and requires no bankruptcy expertise. For a United States Attorney to claim lack of familiarity with the fundamental rule governing service of process is startling. Rather than ignorance with the applicable service rule (which would not be an excuse in any event), the cause of the untimely service was negligence and oversight. The misdocketed complaint sat for five months before anyone did anything to cause it to be properly docketed and a summons to be generated by the Clerk. The Court twice was compelled by the Government's inaction to send out a Lack of Prosecution Order to stimulate some response on the Government's part. Indeed for the Government's counsel not to acknowledge this failure shows a lack of comprehension of

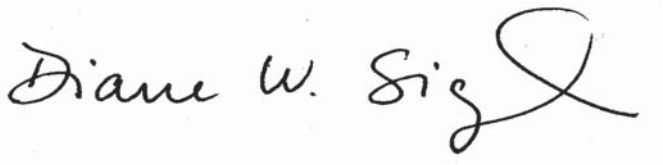
[6] MCI Telecommunications considered "good cause" under former Fed.R.Civ.P. 4(j), the predecessor to Rule 4(m). However, in Petrucelli, the Third Circuit explained that the change which exists in Rule 4(m) did not impact the good cause analysis, and prior decisions under Rule 4(j) remained intact for this purpose. 46 F.3d at 1307 n.11.

counsel's responsibilities as a litigant. As there was never a request for an enlargement of service time and as lack of prejudice to the plaintiff is not dispositive, I easily conclude that there is no good cause for the untimely service.

Exercise of discretion to extend service. The one factor that mitigates in favor of an extension was not noted by the Government's counsel, perhaps because of his self acknowledged ignorance of the bankruptcy law that he sought be applied when he filed an action to deny the Debtor a discharge. Should I fail to extend service and dismiss the Complaint, the statute of limitations would completely bar the Government's potentially legitimate claim. See note 4 supra. I am mindful that this is the type of circumstance that the drafters of the 1993 amendment that gave rise to present Rule 4(m) contemplated for a discretionary extension. Charles v. Woodley, 2005 WL 3487864, at *6 (V.I. Super. Nov. 21, 2005) (*quoting* Advisory Committee Notes to Subdivision (m) stating "relief may be justified ... if the applicable statute of limitations would bar the refiled action."). The Complaint alleges that Debtor should not be discharged of her debt to the Social Security Administration arising from an overpayment of disability benefits because she obtained those funds by a false representation that she had no income when she was receiving wages, and state unemployment and worker's compensation benefits. The consequence of this litigation, if successful, is to recover funds for the public treasury, a result that should not be precluded because of counsel's negligent handling of his client's claim. In short, I do not agree with Debtor's counsel that the Government's counsel

should not be "given a pass." It is the Government, not its counsel, which would be impacted by this judgment.[7]

An Order consistent with this Memorandum Opinion extending the date of service until July 21, 2008 and directing Debtor/ Defendant to answer the Complaint in twenty (20) days will be entered.



DIANE WEISS SIGMUND
United States Bankruptcy Judge

December 8, 2008

[7] I do agree with Debtor's counsel that this is not the level of competence one would expect from an Assistant United States Attorney. Presumably the Court's findings to that effect will serve a prophylactic end.